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No. 01-1754

In The Supreme Court Of The United States

RICHARD E. FOX,

Petitioner,

v.

RALPH COYLE, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner Fox was tried, convicted and sentenced to death in Ohio for the 1989 kidnapping and murder of Leslie Keckler. By his choice, the case was heard by a three-judge panel rather than a jury.

Every state and federal court to examine Fox's case since his trial twelve years ago has agreed that the death sentence was properly imposed on him. None of the four questions in his petition warrants review here, for he simply alleges that Ohio's courts – and later, the federal courts – ignored settled law in his particular case. Even were those kind of claims appropriate for review in this Court, the opinions of the state supreme court and other courts along the way do not support the spin that Fox gives them.

Fox does not challenge Ohio's capital sentencing scheme, does not show how the opinion of the circuit court of appeals conflicts with opinions from other circuits, and does not show why arguments that numerous state and federal courts have examined repeatedly should now be examined yet again here. The petition should be denied.

REASONS FOR DENYING THE WRIT

I. The First Question Raises Nothing Beyond A Claim Of Lower-Court Error, And The Record Does Not Support The Claim In Any Event.

No one doubts that state courts in capital cases must carefully distinguish between aggravating circumstances and mitigating evidence. No state or federal court below has suggested otherwise. The point is so unremarkable that the district court and the Sixth Circuit declined to grant a certificate of appealability to petitioner Fox when he argued

below that the state supreme court misapplied state law concerning aggravating factors and mitigating evidence.

Even apart from the fact that the circuit court of appeals below did not review the argument that Fox raises in his first question, that question identifies for this Court nothing beyond an alleged misapplication of settled law in this one case. There is no conflict among the circuit courts of appeals on the question, for none of the cases cited in the Petition at 13 say anything that conflicts with the approach that Ohio courts follow in capital cases. As Fox himself notes, the relevant Ohio statute requires the trial jury or panel of judges to weigh all mitigating factors against the aggravating circumstances, Pet. at 10-11, and he certainly does not suggest that the Ohio statute itself runs afoul of the Eighth or Fourteenth Amendments.

What Fox *does* say is that in his particular case, the state supreme court made a mistake. But he does not challenge the state *trial* court's entirely proper identification of the single aggravating circumstance that existed in this case: the fact that Fox committed a murder during the course of a kidnapping, Pet. App. at 161a. The Ohio law in effect at the time of Fox's crime treated that kind of kidnapping-murder combination as an aggravating circumstance, see O.R.C. 2929.04(A)(7), and that circumstance was proven by the government beyond a reasonable doubt, according to the state trial court. Pet. App. at 161a.

The trial court also rightly weighed against that one aggravating circumstance the various mitigating factors that Fox presented during the sentencing phase of his trial. Pet. App. at 158a-161a. Fox's argument supporting his first question offers no criticism at all of the way that the state trial court reached its decision to impose a death sentence, and the trial court's opinion on the point is straightforward and unremarkable.

In reviewing the trial court's judgment, both the state court of appeals, Pet. App. at 138a-143a, and the state supreme court, Pet. App. at 109a-111a, then reweighed the mitigating factors against the sole aggravating circumstance, just as Ohio law demands. Ohio law in effect at the time of Fox's trial called for the trial court – and any higher courts reviewing the judgment on appeal – to weigh as mitigating factors the "history, character, and background of the offender," as well as "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death." O.R.C. 2929.04(B) and (B)(7).

The state court of appeals and the supreme court did just that. True enough, the state supreme court gave Fox's "steady employment, favorable character testimony and lack of a prior criminal record . . . only modest weight" as mitigating factors. Pet. App. at 111a. But just because Fox feels that those factors should have worked more strongly in his favor certainly does not mean that the Ohio high court violated the Constitution in ruling as it did.

Most importantly, the state supreme court did *not* describe Fox's "history, character, and background," O.R.C. 2929.04(B), as *aggravating* factors. See Pet. App. at 110a (explaining that "Fox's history, character and background are entitled to weight in mitigation"). Nothing in Ohio's laws – let alone in the Constitution – compelled the state supreme court to draw any particular conclusions about the mitigating evidence that Fox presented. The court was to consider the mitigating evidence, and it did so. The court was to weigh that evidence against the aggravating circumstance, and it did that also. And the court was to affirm the death sentence imposed by the trial court only if satisfied "by proof beyond a reasonable doubt . . . that the aggravating circumstances . . . outweigh the mitigating factors." O.R.C. 2929.03(D)(3). The state supreme court did exactly that. Pet. App. at 109a-111a.

For all of those reasons, the first question in the petition does not warrant review. Fox cites no flaw in Ohio law or even in the procedures that the trial court followed in sentencing Fox to death. As for the issue that Fox *does* allege, nothing about the Ohio Supreme Court's handling of the mitigation evidence suggests that that court misapprehended the distinction between aggravating circumstances on the one hand and mitigating factors on the other. The particular mitigating evidence that Fox presented to the trial court was entitled to "some weight" according to the state supreme court, Pet. App. at 110a, but in the end the court found that "the aggravating circumstance outweighs [the] mitigating factors, even when the mitigating factors are considered in their entirety." Pet. App. at 111a. That straightforward application of settled law to particular facts did not warrant the issuance of a certificate of appealability in the district court or the circuit court of appeals, and it does not warrant review here.

II. Neither The Parties Nor The Courts Are Divided On The Second Question In The Petition.

Petitioner Fox claims that the Court should decide in this case whether his effort to secure review of the first question now is timely, or whether instead he should have filed a petition for certiorari within 90 days after the court of appeals denied his certificate of appealability on the question back in October of 2000. We see no need for the Court to address that issue in this case, however, for we do not disagree with the prisoner-friendly view of the law that Fox urges the Court to adopt.

We have never argued that his cert. petition raising the first question ought to have been filed (if at all) long ago, and we do not challenge his right to present the question at this time along with his other questions that challenge the

final judgment of the court of appeals. For all of the sensible policy reasons that Fox explains on page 18 of his Petition, we agree that habeas petitioners should raise any challenges to a circuit court's denial of a certificate of appealability at just the time that Fox himself has chosen to raise his: when the court of appeals has issued a final judgment denying habeas relief to the prisoner on any claims that the circuit court of appeals *did* review on the merits.

That view gives prisoners the maximum amount of time within which to seek review of a circuit court's refusal to grant a COA on some issues, and Fox has taken full advantage of that extra time, bringing to this Court now both his first question in the Petition, as well as a separate application asking this Court to issue its own COA on that one issue. (No. A01-942, denied by Justice Stevens on 6/4/02). Again, we have no objection to Fox's decision to raise now in those two ways his challenge to the circuit court's October, 2000 action on the issue that Fox describes in his first question. In our view, nothing in this Court's rules, in 28 U.S.C. 1254 or in 28 U.S.C. 2101 (Pet. at 1-2) bars Fox from raising his first question now in his cert. petition. Because neither we nor any federal court has suggested a different view on the timing issue than the one that Fox lays out in his petition, and because that view is the most prisoner-friendly reading of the relevant statutes and rules, we see no reason for the Court to address the second question in Fox's cert. petition now.

III. The Courts Below Did Not Flout Settled Law In The Way That Fox Claims In His Third Question.

Fox suggests in his third question that the Ohio Supreme Court misapplied Ohio law when that court examined whether a death sentence was proper for Fox. As with the first question in the petition, this one does not focus on any recurring legal question of national importance, nor

any split among the circuit courts of appeals. Fox simply argues that the state courts and the federal courts all erred in their examination of the legality of his death sentence.

And as with the first question, the premise of Fox's third question – that Ohio's courts treated the circumstances of Fox's crime as an aggravating factor during the sentencing phase of his trial – is not borne out by the opinion of the state supreme court or those of the other courts that have examined Fox's sentence.

In fact, the state supreme court itself explained in its opinion that the only aggravating circumstances that may be considered by a court in Ohio are "those specifically enumerated in R.C. 2929.04(A)." Pet. App. at 107a. As that court said, "[r]eliance upon nonstatutory aggravating circumstances may constitute reversible error." Pet. App. at 107a-108a.

Fox takes the view that the state supreme court, having just explained that entirely correct view of the law in Ohio, then did exactly what the court itself had said cannot be done. That view is not supported by common sense, let alone by the state supreme court's opinion.

The Ohio high court explained that "[k]idnapping was the specified statutory aggravating circumstance" in Fox's case. Pet. App. at 108a. Neither we nor any state or federal court that has reviewed Fox's sentence has suggested otherwise. And the court said that a jury or trial court in an Ohio capital case "may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." Pet. App. at 108a. That view is hardly remarkable, and is certainly consistent with this Court's own statements about the sentencing process in capital cases. Nothing in the Ohio Supreme Court's analysis

of the mitigating factors in Fox's case points toward the kind of "wholly arbitrary and capricious" sentencing procedure that we all agree is impermissible. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

This Court has in fact said directly that "the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty." *Tuilaepa v. California*, 512 U.S. 967, 976 (1994). That is all that the Ohio Supreme Court's opinion says as well, and the court added that a court's permissible decision to give little weight to mitigating factors in a particular case is not the same thing as a court's impermissible decision to treat that evidence as a "nonstatutory aggravating circumstance." Pet. App. at 108a. Ohio's courts did the former, not the latter, and the state supreme court said as much.

The Sixth Circuit agreed, finding that "[t]he planning and violence of the crime were neither weighed against the mitigating evidence nor used as aggravating circumstances" by the state supreme court. Pet. App. at 18a. According to the Sixth Circuit, "while the nature and circumstances of the crime may be considered, such factors may not be weighed against the mitigating circumstances, nor may they be included among the aggravating circumstances." *Id.* Nothing in the state supreme court's opinion says otherwise.

Had the state supreme court flouted Ohio law concerning the distinctions between aggravating circumstances and mitigating factors, or had that court said that the violence and the planning surrounding Fox's crime were themselves aggravating factors, then Fox's claim might warrant review. But in every court to examine the question, the conclusion has been that Ohio's courts followed Ohio law in deciding that Fox was eligible for the death penalty and that he deserved that penalty. The state and federal courts at

every level have stated the law correctly, and then have applied it correctly as well. The issue does not warrant another round of appellate review here.

IV. The Ohio Supreme Court Did Not Rely On A Separate Criminal Incident Involving Another Of Fox's Victims When That Court Affirmed Fox's Death Sentence.

Finally, Fox presents a question about the use by state courts of unproven criminal charges against defendants in the sentencing phase of capital cases. But the Ohio Supreme Court's opinion explaining that court's "independent reassessment" of Fox's death sentence does not even mention the uncharged incident described in Fox's fourth question. See Pet. App. at 109a-111a. The circuit court of appeals below observed as much. Pet. App. at 19a ("[O]ur own careful reading of the Ohio Supreme Court's independent reweighing of the aggravating and mitigating circumstances discloses no reliance on the Ritchey incident. Indeed, the Ohio Supreme Court does not mention the Ritchey incident.").

As the Sixth Circuit explained, the state supreme court's "independent examination of the aggravating and mitigating circumstances" of Fox's case without reference to the separate incident involving victim Marla Ritchey "thus cured any error that may have been introduced by the lower state court's reference" to that incident. Pet. App. at 19a. This Court has explained that just that kind of independent reweighing by a state supreme court can cure lower-court errors in the weighing process. See, e.g., *Clemons v. Mississippi*, 494 U.S. 738, 752-53 (1990) (finding no constitutional violation in a state supreme court's decision to apply harmless-error analysis when reviewing a lower court's consideration of an invalid aggravating circumstance);

Barclay v. Florida, 463 U.S. 939, 958 (1983) (plurality opinion) (same).

To be sure, if the trial court or the state supreme court had said that Fox's actions involving a different victim could be used as an aggravating circumstance in this case, or if those courts had said that that other incident could and should be thrown into the mix during the state courts' independent weighing or reweighing of the various aggravating and mitigating factors in this case, then the fourth question might warrant a closer look. Yet given that neither the trial court, Pet. App. at 157a-162a, nor the state supreme court, Pet. App. at 109a-111a, said either of those things, and given that neither court in fact made any mention of the separate Ritchey incident when those courts examined and reexamined the aggravating and mitigating evidence that the parties had presented in the trial court, this case hardly presents a sound vehicle for an examination of the fourth question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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